Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-233

No._____

In The

Supreme Court of the United States

October Term, 1985

CITY OF LAWTON, OKLAHOMA, a municipal corporation; **STEVEN WERTZ;** and **KENT DUNEGAN,**

Petitioners,

vs.

SOLOMON LUSBY, VAUGHN LUSBY and **ALVIN JERARD LUSBY,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David M. Curtis
City Attorney
City of Lawton, Oklahoma
103 S.W. 4th Street
Lawton, Oklahoma 73501
Tel. No. (405)581-3320

Attorney for Petitioners
and Counsel of Record

August, 1986

43pp

QUESTION PRESENTED

1. QUESTION: Whether an improper Tuttle jury instruction which allows imposition of § 1983 municipal liability on the basis of a single isolated incident, without benefit of additional evidence, constitutes harmless error?

LIST OF PARTIES

The Petitioners are the City of Lawton, Oklahoma, a municipal corporation, Steven Wertz, and Kent Dunegan, City of Lawton police officers. These Petitioners were defendants in the trial court below.

The Respondents herein, plaintiffs below, are Solomon Lusby, Vaughn Lusby, and Alvin Jerard Lusby.

TABLE OF CONTENTS

	PAGE
Question Presented.....	i
List of Parties.....	ii
Table of Authorities.....	iv
Introductory Statement.....	1
Opinions Below.....	3
Jurisdictional Statement.....	3
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case.....	6
Reasons for Granting the Writ.....	9
Conclusion.....	12
Appendix A: Opinion Below [Decision of the United States Court of Appeals for the Tenth Circuit, filed July 11, 1986	1a
Endnotes to Appendix A.....	14a
Appendix B: Letter from Supreme Court of the United States Office of the Clerk, dated October 7, 1985.....	19a
Appendix C: Trial Court Instructions..	20a
Certificate of Service.....	25a

TABLE OF AUTHORITIES

CASES: **PAGE**

City of Oklahoma City v. Tuttle,
471 U.S. ____ (1985)..... passim

Constitutional Provisions:

Fourth Amendment..... 3

Fourteenth Amendment..... 4

Statutes:

28 U.S.C. § 1254(1)..... 3

28 U.S.C. § 1652..... 4,5

42 U.S.C. § 1981..... 8

42 U.S.C. § 1983..... 8

42 U.S.C. § 1985..... 8

42 U.S.C. § 1986..... 8

22 Okla. Stat. 1981 § 187..... 4,5

22 Okla. Stat. 1981 § 202..... 5

22 Okla. Stat. 1981 § 205..... 6

22 Okla. Stat. 1981 § 1342..... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

CITY OF LAWTON, OKLAHOMA,
a municipal corporation; **STEVEN WERTZ;**
and **KENT DUNEGAN,**

Petitioners,

vs.

SOLOMON LUSBY, VAUGHN LUSBY and
ALVIN JERARD LUSBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTORY STATEMENT

This Petition for Certiorari arises out of this Court's previous order granting certiorari to the Court of Appeals for the Tenth Circuit to review its decision and jury instructions in light of City of Oklahoma City v. Tuttle, 471 U.S. _____ (1985).

In compliance therewith, the Court of Appeals, after finding that the instruction was identical to and as improper as the

instruction struck down in Tuttle, nevertheless held that the improper Tuttle instruction was harmless error.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears in full at Appendix A, infra.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 16, 1986. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Law. Involved with the issues arising from this case are certain constitutional rights found in the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Fourth Amendment reads in its entirety:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment to the Federal Constitution states as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Statutory Law. Applicable to this matter are certain provisions of the Civil Rights Act of 1871, particularly 42 U.S.C., § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

In addition, the provisions of 28 U.S.C., § 1652, regarding the applicability of state law in federal proceedings, are also involved

in this matter. 28 U.S.C., § 1652, states as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

3. State Statutory Law. Statutory laws of the State of Oklahoma bearing on this case are three (3) statutes dealing with the authority of private citizens to make arrests, to wit: 22 Okla. Stat. 1981, §§ 187, 202 and 205. Section 187 of Title 22 Okla. Stat. 1981 reads:

> "An arrest may be either:
>
> 1. By a peace officer, under warrant,
>
> 2. By a peace officer without a warrant; or,
>
> 3. By a private person."

22 Okla. Stat. 1981, § 202, states:

> "A private person may arrest another:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony although not in his presence.
>
> 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

22 Okla. Stat. 1981, § 205, provides:

> "A private person who has arrested another for the commission of a public offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer."

Regarding the authority of a law enforcement officer to arrest a person reasonably suspected of stealing merchandise from retailers or wholesalers, 22 Okla. Stat. 1981, § 1342, states as follows:

> "Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner."

STATEMENT OF THE CASE

The City of Lawton's previous Petition for a Writ of Certiorari was granted on October 7, 1985 (App. B). The court of Appeals for the Tenth Circuit was therein directed to further consider the case in light of City of Oklahoma City v. Tuttle, 471 U.S. ____ (1985). In compliance, the Court of Appeals found the trial court's instruction to be identical to and as improper as the instruction struck down in the Tuttle case. However, the Court of Appeals did

not reverse, holding that the improper instruction was harmless error.

The original case arose out of a single incident which occurred on July 6, 1979, in a general merchandise store located in Lawton, Oklahoma, owned and operated by T.G.&Y Stores, Inc.. After a T.G.&Y security guard confronted one of the respondents whom he suspected of shoplifting, a struggle ensued resulting in the arrest of all three respondents. The respondents were transported to the Lawton city jail by two police officers, Petitioners Wertz and Dunegan.

The respondents originally filed their complaint in the United States District Court for the Western District of Oklahoma on June 23, 1980, alleging numerous theories of recovery. The complaint also charged that T.G.&Y security guard, the City, and its officers had singled out members of Lawton's Black community for physical and mental harassment. Further, respondents claimed that the City of Lawton was negligent in its training, selection, education, and discipline of its police officers, and that this condition arose to the status of

a "municipal policy" for which the City was liable. It was further alleged that these petitioners were also liable to respondents for pendent state claims involving false arrest, assault, defamation, and malicious prosecution. The respondents asserted that petitioners and T.G.&Y were racially motivated in their action toward respondents, and had actually asserted a claim under 42 U.S.C. § 1981. However, these claims were never successfully developed by respondents and were eventually abandoned. Similarly, respondents claimed conspiracy based on 42 U.S.C. §§ 1985 and 1986.

The trial court submitted seven theories of liability to the jury as to each respondent. As to Respondent Solomon Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest, and the malicious prosecution claim. As to Respondent Alvin Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest, and the malicious prosecution claim. As to Respondent Vaughn Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest

claim, the assault and battery claim, and the malicious prosecution claim.

There was no showing or evidence at trial that any incidents similar to this particular event had ever occurred in the past. Further, the municipal liability of the petitioner, City of Lawton, was restricted to allegations of failure to properly hire, train, or supervise its police employees. Restriction of City of Lawton's liability to these issues is unequivocally borne out by the liability issue regarding City of Lawton which was submitted to the jury (App. C).

REASONS FOR GRANTING THE WRIT

This Court previously granted Petitioners City of Lawton, Steven Wertz, and Kent Dunegan's Writ for Certiorari to the Court of Appeals for the Tenth Circuit, requiring that court to reconsider its opinion in light of Tuttle.

Although the Court of Appeals found that its instruction was identical to, and as improper as, the instruction found in Tuttle, it

nevertheless declined to reverse, holding that such an instruction is harmless error.

The Supreme Court's language in Tuttle clearly directs that an improper jury instruction of this type cannot be held harmless, because, under the instruction, the jury could have imposed liability based upon a single incident without the benefit of additional evidence. The appellate court's findings clearly conflict with the principals previously announced in Tuttle and related cases.

Petitioners therefore submit that the Tuttle case unequivocally demonstrates that the offending instruction is not harmless error and that this Petition for Certiorari should be granted.

The Court of Appeals additionally held that Petitioner City of Lawton has waived objection to the offending instruction under the provisions of Federal Rule of Civil Procedure 51. Again, in Tuttle, this Court held that non-jurisdictional defects of this sort should be brought to this Court's attention no later than in respondents' Brief in Opposition to the Petition for Certiorari; if not, the Supreme

Court then shall consider it within its discretion to deem the defect waived. The Petitioner City of Lawton points out that the objection to the offending instruction was previously presented to this Court, and it was upon that ground that this Court granted certiorari. This Court has previously granted certiorari and committed its scarce judicial resources to instructing on the single incident issue. The petitioners respectfully request that certiorari again be granted in this cause.

CONCLUSION

For the reason that an improper Tuttle instruction cannot be held to be harmless error, Petitioners urge this Court to grant this Petition for Certiorari.

Respectfully submitted,

DAVID M. CURTIS
City Attorney for
Lawton, Oklahoma

103 SW 4TH STREET
LAWTON, OKLAHOMA 73501
TEL. NO. (405)581-3320
Attorney for Petitioners
and Counsel of Record

APPENDIXES

APPENDIX A: OPINION BELOW

Decision of the United States Court of Appeals for the Tenth Circuit

filed July 11, 1986, and is not yet reported.

[NOTE: footnotes are set out as endnotes and follow the text of the opinion]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 & 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON, OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants.	)	

On Remand from the United States Supreme Court

Submitted on the briefs:

Page Dobson and Michael W. Hinkle of Holloway, Dobson, Hudson & Bachman, Oklahoma City, Oklahoma, for Defendants-Appellants T.G.&Y Stores, Inc. and Charles Gent.

David M. Curtis, City Attorney, Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

Jack L. Kinzie and Gretchen A. Harris of Andrews, Davis, Legg, Bixler, Milsten & Murrah, Oklahoma City, Oklahoma, and Linda G. Scoggins of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, for Plaintiffs-Appellees.

Before LOGAN and McWILLIAMS, Circuit Judge, and CAMPOS, District Judge.*

LOGAN, Circuit Judge.

---

*The Honorable Santiago E. Campos, United States District Judge for the District of New Mexico, sitting by designation.

After examining the briefs and the record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this case. See Fed. R. App. P. 34(a); Tenth Cir. R.10(e). The cause is therefore ordered submitted without oral argument.

Solomon, Vaughn, and Alvin Lusby were arrested in Lawton, Oklahoma, after allegedly shoplifting from a Lawton T.G.&Y. store. In fact there had been no shoplifting, and the Lusby brothers sued in federal court the city of Lawton, T.G.&Y., the off-duty Lawton police officer who served as a store guard, and the Lawton police officers who made the arrest. The brothers asserted federal Civil Rights Act and pendent state law claims against each defendant. A jury returned a verdict for each of the Lusby brothers against each defendant on their 42 U.S.C. § 1983 claims, also finding liability on some of the pendent claims. Two separate appeals were taken; the cases were consolidated; and this court affirmed. The details are set out in our opinion, Lusby v.

T.G.&Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984).

T.G.&Y. filed a petition for certiorari to the United States Supreme Court. The city and its police officers filed another. The Court granted the city's petition, issuing a one-sentence order vacating the judgment and remanding to this court "for further consideration in light of City of Oklahoma v. Tuttle, 471 U.S. ____[, 105 S.Ct. 2427, 85 L.Ed.2d 791] (1985)." City of Lawton v. Lusby, ___ U.S. ___, 106 S. Ct. 40 (1985). On the same day the Court denied T.G.&Y.'s petition. T.G.&Y. Stores, Inc. v. Lusby, ___U.S. ___, 106 S. Ct. 65 (1985). On reconsideration we reaffirm.

In Tuttle the Supreme Court examined how much evidence would be necessary to allow an inference of a municipal "policy or custom" as support for municipal liability on a § 1983 claim. The Court held that a jury instruction permitting an inference of a policy from evidence of one instance of misconduct alone was improper. 471 U.S. at ___, ___, 105 S. Ct.

at 2436, 2441. In the present case, as part of a lengthy instruction to the jury on the possible liability of the city, the trial court stated:

> "[A] single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amount [sic] to deliberate indifference or gross negligence on the part of officials in charge."

R. XXV, 1679.[1] This instruction was almost identical to the instruction struck down in Tuttle, 471 U.S. at ___, 105 S. Ct. at 2430-31, and therefore also was improper.

This does not mandate reversal, however. We first note there was substantial evidence demonstrating that Lawton had a policy that violated plaintiffs' constitutional rights. See Lusby, 749 F.2d at 1430-32. Harmless error analysis normally applies in civil cases, see 28 U.S.C. § 2111; Fed. R. Civ. P. 61, and it specifically applies to faulty jury instructions, see 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 61.09 (2d ed. 1985); 11 C.

Wright & A. Miller, Federal Practice and Procedure § 2886 (1973). The error is harmless when the erroneous instruction could not have changed the result of the case.

Some of the Supreme Court's language in Tuttle, however, appears to suggest that an improper jury instruction of this type cannot be held harmless. The plurality opinion states that plaintiffs' independent evidence of inadequate training makes no difference because under the instruction the jury "could" have imposed liability based upon a single incident. See Tuttle, 471 U.S. at ___, 105 S. Ct. at 2435; cf. Connecticut v. Johnson, 460 U.S. 73, 85 (1983) (no reason to believe jury undertakes more difficult task of weighing evidence on one element of crime when alternative element can be presumed). Justice Brennan's concurring opinion also states that "the judgment must be reversed because the instructions permitted the jury to find the city liable even if the jury did not believe" the other evidence of inadequate training of officers. Tuttle, 471 U.S. at ___, 105 S. Ct. at 2441 n.7. Yet we are

reluctant to read Tuttle as foreclosing harmless error analysis because of the Supreme Court's routine application of such analysis--even in criminal cases involving important constitutional rights. See, e.g., Rose v. Clark, 54 U.S.L.W. 5023 (U.S. July 2, 1986); Chapman v. California, 386 U.S. 18 (1967).

We need not decide whether harmless error analysis applies, however, because the city did not object to the "single incident" instruction at trial. Ordinarily, unless objection to a faulty instruction is made before the jury retires, error may not be found later. Fed. R. Civ. P. 51. In Tuttle the plaintiff did not raise the city's failure to object to the instruction until the case reached the Supreme Court. The Court ruled that the procedural defense came too late. The Court's plurality opinion noted that the argument "might have prevailed had it been made to the Court of Appeals" but, because the faultiness of the instruction had been argued by the parties and decided squarely in the Court of Appeals, the contemporaneous objection argument would be

regarded as waived by the plaintiff. Tuttle, 471 U.S. at ___, 105 S. Ct. at 2432.

The case before us now is in a different posture. Here there also was no objection to the faulty instruction at trial. But unlike Tuttle, on their appeal to this court the defendants' briefs made no objection to the instruction.[2] Our opinion did not mention the instruction. Rather, the defendant city argued on appeal only that there had not been enough evidence of city employees' misbehavior to establish a policy. See Brief of Appellants City of Lawton, Steve Wertz and Kent Dunegan at 27-30. This was an insufficiency of the evidence argument, and we treated it as such. See Lusby, 749 F.2d at 1432.

The city's petition for certiorari in the Supreme Court, filed before the Court decided Tuttle, also made the "single incident" argument as one of sufficiency of the evidence. The jury instruction was mentioned only obliquely in another section of the petition.[3] Plaintiffs' response, filed after Tuttle was issued, did argue that the instruction was not

properly before the Court, because of the city's failure to object at trial or to raise any error in the instruction before the circuit court. Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari at 11-12. We do not read the Supreme Court's cryptic order remanding for our reconsideration in light of Tuttle as a holding that the Rule 51 defect is either waived or inapplicable in this case. There is no point at which we can say that the Lusby brothers' Rule 51 contemporaneous objection argument should have been raised earlier and thus can be regarded as waived. There was no plenary consideration of the instruction's merits, as there was in the circuit court opinion in Tuttle, to preclude raising the procedural defect now. The Lusbys again have raised the Rule 51 issue in their briefs on remand. We hold that it is a timely and valid defense to the city's argument that the instruction error warrants a new trial.

The city is not aided by the plain error

exception to the contemporaneous objection requirement for appellate review. The exception permits an appellate court to correct only "particularly egregious errors" affecting the fairness, integrity or public reputation of judicial proceedings. United States v. Young, ___ U.S. ___, 105 S. Ct. 1038, 1046-47 (1985) (criminal case) (quoting United States v. Frady, 465 U.S. 152, 163 (1982); United States v. Atkinson, 297 U.S. 157, 160 (1936)); United States v. Hooks, 780 F.2d 1526, 1532 (10th Cir. 1986) (criminal case). It is to be used sparingly, only when a "miscarriage of justice" would otherwise result. Young, ___ U.S. ___, 105 S. Ct. at 1047 (quoting Frady, 456 U.S. at 163 n.14). The exception is no less rarely applied in civil cases. See Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1516 (10th Cir. 1984) (use limited to "exceptional cases"; late objection to faulty jury instruction disallowed), aff'd, ___ U.S. ___, 105 S. Ct. 2847 (1985).

In determining whether plain error applies

in this case, we must view the instruction error in the context of the entire record. Young, 105 S. Ct. at 1047. "It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." Id. We do not read Tuttle to command a finding of plain error in the instant case, especially in light of the plurality's statement that, if the failure to object to the instruction had been raised earlier, that argument might have prevailed. Tuttle, 471 U.S. at ___, 105 S. Ct. at 2432.[4]

We are satisfied that, viewing the record as a whole, there was sufficient evidence of more than a single incident to support the establishment of a city policy and hence liability.[5] First, the city's brief on the initial appeal recited that plaintiffs had introduced evidence of seven instances of police action to meet its burden to establish a city policy or custom that violated their constitutional rights. It asserted that the instances were either unsubstantiated or otherwise defective. Second, there was in the record a "smoking

gun," so to speak. The police chief admitted a policy of arresting shoplifting suspects without any independent investigation of merchants' allegations and providing special forms to merchants detaining suspects that allowed officers to issue summons to suspects when they arrived at the store. Lusby, 749 F.2d at 1430, 1432. The unconstitutional policy was thus in effect admitted, and the instances introduced by the Lusbys were not even needed for an inference of a city policy, as our original opinion noted. Id. In light of this we see no miscarriage of justice requiring that the city be given a new trial.[6]

What has been said about the city's case applies a fortiori to the other defendants. None of them objected to the instruction. In fact, the instruction given with respect to their liability did not contain the reference to a single incident.[7] The brief for T.G.&Y. and Gent on the initial appeal made no argument against the instruction; it mentioned single incident cases only in making a sufficiency of the evidence argument. Further, the Supreme

Court denied those defendants' petition for certiorari on the same day it granted the petition of the city and its officers.

We reaffirm our decision.

ENDNOTES TO APPENDIX A

[1] The entire instruction read as follows:

"INSTRUCTION NO. 15

LIABILITY OF THE CITY OF LAWTON

If you have found that the plaintiffs were denied any of the civil rights outlined in Instruction No. 11, then you should consider whether the City of Lawton is liable for the denial of the civil right or rights in question.

The standards for assessing liability of the City are different from the standards assessing the liability of an individual person.

If a police officer denies a person his constitutional rights, the town or city that employs that officer is not liable for such a denial or right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Lawton is not liable for the deprivation of plaintiffs' constitutional rights solely because it hired and employed the defendants Wertz and Dunegan. But there are circumstances under which a city is liable for a deprivation of constitutional rights. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies or acquiesces in the constitutional deprivations in such a manner that such constitutional deprivations can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Lawton can be found to have authorized, sanctioned, or acquiesced in any denial of plaintiffs' rights only if an official

policy which results in constitutional deprivations can be inferred from informal acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the plaintiff.

It is plaintiffs' contention that such a policy existed and they rely upon allegations that the City is grossly negligent in its training of police officers, in the lack of continuing training during the course of their employment, and the City's failure to supervise, review, and discipline members of the police force. Plaintiffs allege that the failure of the City to adequately supervise, train, review, and discipline police officers constitutes deliberate indifference to the constitutional rights of the plaintiffs and acquiescence in the probability of serious police misconduct.

The City, of course, denies plaintiffs' allegations and further denies the existence of an official policy of the City of Lawton which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of offensive acts.

Absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, official policy such as to impose liability on the City of Lawton under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force; but a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to

"deliberate indifference: or "gross negligence" on the part of officials in charge.

A municipality or city may not, under the law, assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Lawton knowingly violated plaintiffs' civil rights under this instruction, then you should find for the plaintiffs and against the City without considering any affirmative defense of good faith."

[2] The panel does not recall any objection to the instruction at oral argument, which was not recorded.

[3] "However, City begs this Court to read Instruction No. 15 regarding the liability of the City for § 1983 claims given at trial (App. E). What were the jury issues on City's liability: negligent training, failure to supervise and police misconduct." Petition for a Writ of Certiorari at 14-15.

[4] Plain error analysis in the context of failure to make a contemporaneous objection required under Rule 51 differs from harmless error analysis. In the former the party who failed to object (usually the appellant) has the burden to show that the error almost surely affected the outcome of the case. In harmless error analysis the beneficiary of the error (usually the appellee) has the burden to show that the error almost surely did not affect the outcome of the case.

[5] The Supreme Court has since made it clear that, although a single incident of unconstitutional conduct will not support a finding of a municipal policy, once a policy is established a single application will satisfy the law's requirements. Pembaur v. City of Cincinnati, 54 U.S.L.W. 4289,4292 n.6 (U.S. March 25, 1986).

[6] Although the Supreme Court's decision in Tuttle was issued long after the instant case was tried, there is no retroactivity problem

here. The issue was one which the parties should have been aware of and raised during the trial of the case. This trial was held in 1981. We had held in McClellan v. Facteau, 610 F.2d 693 (10th Cir. 1979), that showing "individual officers violated a person's constitutional rights on an isolated occasion is not sufficient to raise an issue of fact whether adequate training and procedures were provided." Id. at 697 (emphasis added). The city's briefs in this court cited 1980 and 1981 federal district court decisions holding that a single incident of illegal conduct did not support a finding of governmental custom or policy. Brief for Appellants City of Lawton, Steve Wertz and Kent Dunegan at 26. T.G.&Y.'s brief cites McClellan and a 1982 Seventh Circuit case to the effect that a single act of unconstitutional conduct did not support an inference of an impermissible policy. Brief of Appellants T.G.&Y. Stores, Inc. and Charles Gent at 12, 19. These cases were cited as part of defendants' argument that no enough evidence had been presented, and not as an argument objecting to the "single incident" instruction. Our own decision in Tuttle could not have misled defendants because it was not decided until 1984, well after the 1981 trial of the present case. See Tuttle, 728 F.2d at 456. Thus defendants should have objected to the instruction.

[7] The pertinent part of that instruction is as follows:

> "Plaintiffs have alleged that Defendants Gent, Wertz and Dunegan, acting in concert as police officers, and Gent, as an employee of TG&Y and acting in concert with other employees of TG&Y, knowingly and maliciously and without justification or probable cause, caused certain misdemeanor charges to be filed against the Plaintiffs and that this was part of a customary plan between the police and TG&Y resulting in the unlawful detention of Plaintiffs.

Defendants deny that any such custom existed and deny that TG&Y acted under color of law."

R. XXV, 1675.

APPENDIX B: **[Letter from Supreme Court of the United States Office of the Clerk Washington, D.C. 20543 dated October 7, 1985.]**

October 7, 1985

Ms. Gretchen A. Harris
Andrews, Davis, Legg, et al.
500 West Main
Oklahoma City, OK 73102

Re: City of Lawton, Oklahoma, et al., v. Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby
No. 84-1715

Dear Ms. Harris:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of City of Oklahoma City v. Tuttle, 471 U.S. ___ (1985).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

APPENDIX C: TRIAL COURT INSTRUCTIONS

[Jury INSTRUCTION No. 15 relating to "official policy" liability of the municipal petitioner, City of Lawton, Oklahoma, on September 30, 1981, by Lee R. West, trial judge, of the United States District Court of the Western District of Oklahoma.]

Instruction No. 15

LIABILITY OF THE CITY OF LAWTON

If you have found that the plaintiffs were denied any of the civil rights outlined in Instruction No. 11, then you should consider whether the City of Lawton is liable for the denial of the civil right or rights in question.

The standards for assessing liability of the City are different from the standards assessing the liability of an individual person.

If a police officer denies a person his constitutional rights, the town or city that employs that officer is not liable for such a denial or right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Lawton is not liable for the deprivation of

plaintiffs' constitutional rights solely because it hired and employed the defendants Wertz and Dunegan. But there are circumstances under which a city is liable for a deprivation of constitutional rights. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies or acquiesces in the constitutional deprivations in such a manner that such constitutional deprivations can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Lawton can be found to have authorized, sanctioned, or acquiesced in any denial of plaintiffs' rights only if an official policy which results in constitutional deprivations can be inferred from informal acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the plaintiff.

It is plaintiffs' contention that such a policy existed and they rely upon allegations that the City is grossly negligent in its training of police officers, in the lack of continuing training during the course of their employment, and the City's failure to supervise, review, and discipline members of the police force. Plaintiffs allege that the failure of the City to adequately supervise, train, review, and discipline police officers constitutes deliberate indifference to the constitutional rights of the plaintiffs and acquiescence in the probability of serious police misconduct.

The City, of course, denies plaintiffs' allegations and further denies the existence of an official policy of the City of Lawton which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well

as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of offensive acts.

Absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, official policy such as to impose liability on the City of Lawton under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force; but a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference: or "gross negligence" on the part of officials in charge.

A municipality or city may not, under the law, assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Lawton knowingly violated plaintiffs' civil rights under this instruction, then you should

find for the plaintiffs and against the City without considering any affirmative defense of good faith.

CERTIFICATE OF SERVICE

I, David M. Curtis, a member of the Bar of the Supreme Court of the United States and counsel of record for City of Lawton, Oklahoma, a municipal corporation; Steven Wertz; and Kent Dunegan, Petitioners herein, hereby certify that on August 13, 1986, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Lawton, Oklahoma, with first class postage prepaid, properly addressed to the address of Jack L. Kinzie and Gretchen A. Harris, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

All parties required to be served have been served.

Dated August 13, 1986.

DAVID M. CURTIS, CITY ATTORNEY
City of Lawton, Oklahoma
103 S.W. 4th Street
Lawton, Oklahoma 73501
(405) 581-3320/3321
Attorney for Petitioners and
Counsel of record

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-233

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF LAWTON, OKLAHOMA,
a municipal corporation;
STEVEN WERTZ; and KENT DUNEGAN,
Petitioners,

v.

SOLOMON LUSBY;
VAUGHN LUSBY; and ALVIN JERARD LUSBY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JACK L. KINZIE
GRETCHEN A. HARRIS*

of

ANDREWS DAVIS LEGG BIXLER
MILSTEN & MURRAH
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241

and

LINDA G. SCOGGINS

of

SPRADLING, ALPERN, FRIOT
& GUM
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0211

Attorneys for Respondents

September, 1986

*Counsel of Record

15 pp

QUESTIONS PRESENTED

1. Whether the City of Lawton may seek this Court's review of a jury verdict by erroneously characterizing the basis for the appellate court's opinion as a finding of harmless error?

2. Whether the City of Lawton may now seek this Court's review of a jury verdict by claiming an instruction given to the jury was improper, despite its complete failure to object to the instruction at trial or before the appellate court and in the total absence of any "plain error"?

3. Whether the City of Lawton may seek reversal of a jury verdict which was premised on articulated findings of violations of state statutes, absent any claim by the City of Lawton that those findings were invalid?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTORY STATEMENT	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I. THE DECISION OF THE COURT OF APPEALS ON REMAND WAS PROPER IN ALL RESPECTS	5
A. The Court Below Correctly Held That, In The Absence Of Plain Error, The City Of Lawton's Failure To Object To An Allegedly Improper Jury Instruction Precluded Its Raising The Issue On Appeal	5
B. Petitioners Do Not Challenge The Factual Basis For The Lower Court's Finding Of No "Plain Error" Rendering This Court's Review Unnecessary	8
II. THIS CASE MERITS NO REVIEW OF THE FINDING OF LIABILITY AGAINST THE CITY OF LAWTON AS THE FINDING ON PENDENT STATE CLAIMS PROVIDES AN INDEPENDENT BASIS FOR AFFIRMANCE OF THE JURY VERDICT	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	PAGE(S)
City of Oklahoma City v. Tuttle, 471 U.S. ——, 105 S.Ct. 2427 (1985)	1
Lusby v. T.G.&Y. Stores, Inc., — F.2d —, Nos. 82-1721, 82-1779, slip op. at 7 (July 16, 1986)	5, 6-7
Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984)	1
Zant v. Stephens, 462 U.S. 862 (1983)	9
OTHER AUTHORITIES	
Fed.R.Civ.P. 51	2, 5-6, 8

No. 86-233

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CITY OF LAWTON, OKLAHOMA,
a municipal corporation;
STEVEN WERTZ; and KENT DUNEGAN,
Petitioners,

v.

SOLOMON LUSBY;
VAUGHN LUSBY; and ALVIN JERARD LUSBY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTORY STATEMENT

Petitioners, in their Introductory Statement, misstate the reasoning and basis for the July 16, 1986 opinion of the United States Court of Appeals for the Tenth Circuit. That misstatement must be corrected.

On November 23, 1984, the United States Court of Appeals for the Tenth Circuit affirmed jury verdicts in favor of all respondents against all petitioners. *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984). Petitioners then petitioned this Court for a writ of certiorari. This Court vacated the lower court's opinion and ordered the appellate court to further consider its opinion in light of this Court's intervening decision in *City of Oklahoma City v. Tuttle*, 471 U.S. __, 105 S.Ct. 2427 (1985). Although this Court did

not specifically articulate its reasons, it is clear that the question remanded to the court below was whether an instruction given by the trial court relating to municipal liability could be the basis, in this case, for a reversal of the jury verdict.

After further consideration, the court below, in accordance with the principles of Rule 51 of the Federal Rules of Civil Procedure, held that, because the City of Lawton failed at trial to object to the jury instruction and because there was no plain error occasioned by the instruction, the City of Lawton was not entitled to a new trial.

The City of Lawton now petitions this Court, erroneously claiming the appellate court found the giving of the instruction "harmless error." To the contrary, the court below held it did not need to reach the "harmless error" issue because the City of Lawton's failure to object to the instruction in light of all the facts and circumstances of the case precluded its questioning of the instruction on appeal. Because the analysis of the court below was legally correct and because petitioner does not take issue with the lower court's factual analysis, the petition for certiorari must be denied.[1]

COUNTERSTATEMENT OF THE CASE

Because the petitioners failed to completely articulate the evidentiary premise on which the jury verdict and appellate affirmance against the City of

---

[1] The petition to this Court is also filed on behalf of police officers Steven Wertz and Kent Dunegan, who were individually found liable to respondents. The petition, predicated solely on the question whether the giving of an instruction on municipal liability is grounds for review, articulates no grounds for the granting of the petition as to Wertz and Dunegan. Thus, the petition must be denied as to them.

Lawton was based, respondents provide this statement of the case.[2]

On July 6, 1979, Vaughn, Solomon and Alvin Lusby stopped at a T.G.&Y. Stores, Inc. store ("T.G.&Y.") located on Sheridan Road in Lawton, Oklahoma and purchased a pair of sunglasses for Vaughn. Charles Gent ("Gent"), an off-duty Lawton police officer employed by T.G.&Y. as a security guard, stopped Vaughn outside the store and asked him if he had a receipt for the sunglasses. Vaughn explained that he had paid for the sunglasses but that he did not have a receipt. Gent showed Vaughn his Lawton Police Department badge, told him he was a Lawton police officer working as a security guard and that Vaughn was under arrest for shoplifting. (Tr. 23-25). Vaughn immediately suggested they go back inside the store to clear up the matter. Vaughn, Alvin and Solomon Lusby, after a scuffle in which Gent drew a derringer pistol, proceeded to the back of the store.

In a few minutes two Lawton police officers, Steve Wertz and Kent Dunegan, arrived at the store and took the Lusby brothers into custody. (Tr. 44). Pursuant to the official, stated Lawton Police Department policy (Tr. 1219), no questions were asked and there was no independent investigation by the police officers. Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them, took them to jail, and put them in cells without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word to affect the arrest before he had even completed the citizen's arrest form. (Tr. 44-47, 638, 1484-87).

---

[2] References to the trial transcript will be identified by (Tr. ____).

Alvin Lusby had requested that his handcuffs be placed in front because of an injured shoulder but his request was refused. (Tr. 46, 47). The fact that he had moved his handcuffs without approval of one of the officers obviously angered Officer Wertz when they arrived at the Lawton police station and he realized what had happened. (Tr. 53). There was evidence that Wertz intentionally and maliciously hit Alvin in the face with his fist and pushed him head first into a brick wall on the way into the jail area. (Tr. 53, 54, 219, 382). The testimony was reinforced by other evidence of Wertz' violent propensities as a police officer. (Tr. 1101-1104, 1135-1192, 1200-1201). There was no evidence that Officer Dunegan took any action to stop the actions of Wertz. The Lusby brothers were finally booked and charges filed against them for assault and battery, resisting arrest, disobeying a lawful order, shoplifting, possession of marijuana, and assault and battery on a police officer (Pl. Exh. 8, 9, 10) after Gent appeared at the station to fill out his arrest forms.

Seven months later, on February 27, 1980, Lawton dropped all charges against the Lusbys. (Tr. 657). For seven months Lawton never investigated the incidents charged against the Lusby brothers or, if it did, it left the charges pending despite overwhelming evidence that no shoplifting occurred. Lawton, through its city prosecuting attorney, also demanded from the Lusby brothers a release of civil liability before it would drop the charges. (Tr. 1361). This demand was articulated official policy; it was required of Larry Mallory, another arrestee beaten by Wertz, prior to the dropping by Lawton of charges filed against him. (Tr. 1189-90).

This case was filed on June 23, 1980. The trial began on September 16, 1981. The jury verdict in favor of the Lusby brothers was rendered on October 1, 1981.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS ON REMAND WAS PROPER IN ALL RESPECTS.

A. The Court Below Correctly Held That, In The Absence Of Plain Error, The City Of Lawton's Failure To Object To An Allegedly Improper Jury Instruction Precluded Its Raising The Issue On Appeal.

As the United States Court of Appeals for the Tenth Circuit noted in its recent opinion, Lawton did not even raise the question whether the challenged jury instruction was improper until its earlier petition to this Court. *Lusby v. T.G.&Y. Stores, Inc.*, ___ F.2d ___, Nos. 82-1721, 82-1779, slip op. at 7 (July 16, 1986). To the contrary, Lawton specifically stated it had no objection to the instructions given at trial (Tr. 1635) and merely claimed insufficiency of the evidence on appeal (Brief of Lawton on Appeal, pp. 27-30). This failure to even obliquely object until its earlier petition for a writ of certiorari required this Court to remand for consideration by the court below whether this failure precluded the raising of the improper instruction on appeal. The court has now directly considered this question and, using the appropriate "plain error" analysis, determined that no "plain error" existed which would necessitate reversal of the jury verdict. That decision is undeniably correct.

Lawton does not argue that the court below was *wrong* when it determined that there was no Rule 51 "plain error" but erroneously characterizes the basis of the court's opinion as a finding of "harmless error." Lawton further argues that, simply because this

Court granted the earlier petition for a writ of certiorari and remanded to the court below for further consideration in light of *Tuttle,* the court below was somehow precluded from applying, on remand, the appropriate Rule 51 "plain error" analysis. These arguments are simply unpersuasive. The court below articulated that it was not relying on any "harmless error" analysis. Rather, the appellate court, after setting forth Lawton's abject failure to object to the jury instruction, the respondents' raising of the Rule 51 issue at the earliest possible time, and the requirement of this Court's remand, stated:

> We need not decide whether harmless error analysis applies, however, because the city did not object to the "single incident" instruction at trial. Ordinarily, unless objection to a faulty instruction is made before the jury retires, error may not be found later. . . .
>
> . . . .Here there also was no objection to the faulty instruction at trial. But unlike *Tuttle,* on their appeal to this court the defendants' briefs made no objection to the instruction.[2] Our opinion did not mention the instruction. Rather, the defendant city argued on appeal only that there had not been enough evidence of city employees' misbehavior to establish a policy. *See* Brief of Appellants City of Lawton, Steve Wertz and Kent Dunegan at 27-30. This was an insufficiency of the evidence argument, and we treated it as such. *See Lusby,* 749 F.2d at 1432.
>
> The city's petition for certiorari in the Supreme Court, filed before the Court decided

Tuttle, also made the "single incident" argument as one of sufficiency of the evidence. The jury instruction was mentioned only obliquely in another section of the petition.[3] Plaintiffs' response, filed after *Tuttle* was issued, did argue that the instruction was not properly before the Court, because of the city's failure to object at trial or to raise any error in the instruction before the circuit court. Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari at 11-12. We do not read the Supreme Court's cryptic order remanding for our reconsideration in light of *Tuttle* as a holding that the Rule 51 defect is either waived or inapplicable in this case. There is no point at which we can say that the Lusby brothers' Rule 51 contemporaneous objection argument should have been raised earlier and thus can be regarded as waived. There was no plenary consideration of the instruction's merits, as there was in the circuit court opinion in *Tuttle,* to preclude raising the procedural defect now. The Lusbys again have raised the Rule 51 issue in their briefs on remand. We hold that it is a timely and valid defense to the city's argument that the instruction error warrants a new trial.

[2] The panel does not recall any objection to the instruction at oral argument, which was not recorded.

[3] "However, City begs this Court to read Instruction No. 15 regarding the liability of the City for §1983 claims given at trial (App. E). What were the jury issues on City's liability: negligent training, failure to supervise and police misconduct." Petition for a Writ of Certiorari at 14-15.

Lusby v. City of Lawton, supra, slip op. at 6-8.

The appellate court thus clearly articulated the procedural history and applied the appropriate legal analysis upon its further consideration of the case on remand.

B. Petitioners Do Not Challenge The Factual Basis For The Lower Court's Finding Of No "Plain Error" Rendering This Court's Review Unnecessary.

The court below, relying on apposite judicial authority, reviewed the trial record, determining that in the light of all the facts and circumstances, the "plain error" exception to Rule 51 did not aid Lawton in this case. The court, after articulation of the facts supported by citations to the record, held there simply had been no "miscarriage of justice" demanding reversal. Moreover, Lawton does not even attempt to show this Court any reason why that factual analysis would justify the granting of its petition for a writ of certiorari. To the contrary, there exists no significant federal or constitutional question with respect to the lower court's "plain error" analysis. The factual determination by the court below must be allowed to stand.

II. THIS CASE MERITS NO REVIEW OF THE FINDING OF LIABILITY AGAINST THE CITY OF LAWTON AS THE FINDING ON PENDENT STATE CLAIMS PROVIDES AN INDEPENDENT BASIS FOR AFFIRMANCE OF THE JURY VERDICT.

As Lawton admitted in its petition to this Court, the jury found in favor of respondents on pendent

state claims. The verdicts on those pendent state claims are in no way tainted by the questioned instruction. That instruction applies only to the liability of Lawton as to civil rights violations. Thus, the state law violations by Lawton serve as unchallenged, independent predicates for the jury's finding.

As this Court stated in *Zant v. Stephens*, 462 U.S. 862 (1983), when there is evidence in the record that the verdict did not rest exclusively on an impermissible portion of an instruction, the giving of the instruction need not mandate reversal. *Id.* at 881. When there is no uncertainty that an independent basis existed, affirmance is permitted. *Id.* Here, where the verdict was obtained from sufficient pendent state claims, review is not necessary; the result is clearly correct.

CONCLUSION

Because petitioners do not challenge the factual predicate for the "plain error" analysis as correctly applied by the court below and because the decision below is consistent with apposite rulings in this Court and circuit courts, the petition for a writ of certiorari should be denied with costs, including attorneys' fees, awarded to respondents.

Respectfully submitted,

JACK L. KINZIE
GRETCHEN A. HARRIS*

of

ANDREWS DAVIS LEGG BIXLER
MILSTEN & MURRAH
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241

and

LINDA G. SCOGGINS

of

SPRADLING, ALPERN, FRIOT
& GUM
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0211

Attorneys for Respondents

September, 1986
*Counsel of Record